The Chamber of Tax Consultants

Discussion on certain significant proposals in the Finance Bill 2022

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  - Computation of interest in case of continuing TDS/TCS default

Reduction in surcharge on LTCG u/s. 112 (A.Y. 23-24)

- Applicable to individual, HUF, AOP, BOI, AJP
- Hitherto, surcharge was capped at 15% in following cases :-
  - For residents and FPIs, on dividends, STCG u/s. 111A and LTCG u/s. 112A
  - For non-residents, on STCG u/s. 111A and LTCG u/s. 112A
- Surcharge for other STCG/LTCG upto 37%
  - Highest effective rates - 42.74% for STCG and 28.5% for LTCG
- FB 2022 proposes to cap surcharge on LTCG u/s. 112 for both residents and non-residents to 15%
  - Highest effective rate for LTCG – 23.92%
  - Applies to all types of assets like real estate property, unlisted shares, debt oriented mutual fund units, debentures, CCDs, etc for both residents and non-residents
  - However, transfer of virtual digital assets will be taxed at 30% plus applicable surcharge (highest ETR being 42.74%)
  - Also, no change in STCG

Exemption for Covid 19 medical assistance and ex-gratia (w.e.f A.Y. 2020-21)

- Codifies Press Release dated 25 June 2021 but with some additional conditions
- Amendment to proviso to s.17(2) – exclusion from perquisite
  - Any sum paid by employer in respect of expenditure actually incurred by employee on his medical treatment or of any family member in respect of illness relating to COVID-19 ***subject to conditions to be notified by CG***
- Amendment to S. 56(2)(x) – exclusion from gift taxation
  - Individual receiving reimbursement of COVID 19 related medical expenses incurred by him for himself or family member, whether received from employer or any other person, ***subject to conditions to be notified by CG*** **(no limit or time threshold but wait for conditions)**
  - Amount received by a member of the family of deceased person where cause of death is illness related to COVID-19
    - From employer of deceased person (without any limit)
    - From any other person or persons to the extent such sum or aggregate of such sums do not exceed Rs. 10 lakhs
  - **Received within 12 months from the death of the individual and subject to other conditions as may be notified by CG**
- 'Family' definition borrowed from s.10(5) –spouse, children, dependent parents/siblings

Exemption for Covid 19 medical assistance and ex-gratia (w.e.f A.Y. 2020-21)

- Additional conditions for exemption of medical assistance and ex-gratia:
  - Receipt within 12 months of death for ex-gratia – Ambiguity for continuing/annuity payments
  - Compliance with conditions to be notified by CG for both medical assistance and ex-gratia
- Rationale for 12 months time limit is possibly to avoid abuse of relief through non-genuine transactions
  - No such restriction for medical assistance but wait for conditions
- Debatable whether 'illness related to COVID-19' can include death due to other co-morbidities
- Definition of 'family' is restrictive ; may not cover all close relations (for instance, daughter-in-law)
- Amendment is effective retrospectively from A.Y. 2020-21. Practically, there may be cases where benefit is received during A.Y. 2021-22 but fail to satisfy the conditions:
  - Whether employer will need to do 'catch-up' TDS for medical assistance? Arguably, no salary TDS obligation for amount taxable u/s. 56(2)(x) in hands of resident
  - Whether individual will need to file updated return under new s.139(8A) with 25%/50% additional tax?
  - Whether individual can refund the amount to the donor to avoid taxation?

New scheme of taxation of income from VDAs

VDA defined under new S. 2(47A)	• VDA defined exhaustively • Includes NFT and any other digital asset to be notified by Government • Provision effective from 1 April 2022
Income from transfer of VDA New S. 115BBH (part of Chapter XII "Determination of tax in certain special cases")	• Income from transfer of VDA taxable at 30% • Provides for computation of income from transfer of VDA • Provision effective from 1 April 2023 (AY 23-24) (i.e. applies to income from transfer arising from 1 April 2022)
TDS on transfer of VDA New S. 194S	• TDS @ 1% on payment made for transfer of VDA to residents • Provision effective from 1 July 2022 • Intent is to widen tax base and capture transaction details
Receipt of VDA S. 56(2)(x) amended	▸ VDAs received for NIL or inadequate consideration taxable in hands of recipient ▸ Provision effective from 1 April 2023 (AY 2023-24)

Dissecting definition of VDA u/s. 2(47A)

Type of VDA	Basic condition	Additional conditions	Exclusion
Crypto-asset	Any information or code or number or token ***(not being Indian currency or foreign currency)***, generated through cryptographic means ***or otherwise***, by whatever name called	**Condition 1** Providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value "**Or"** Functions as a store of value or unit of account including its use in any financial transaction or investment, but not limited to investment scheme "**AND"** **Condition 2** Can be transferred, stored or traded electronically	The Central Government may, by notification in the Official Gazette, exclude any ***digital asset*** from the definition of VDA subject to such conditions as may be specified therein
Non Fungible Token	***Digital asset*** as the Central Government may, by notification in the Official Gazette, specify or any other token of similar nature, by whatever name called		
Residual	Any other ***digital asset***, as the Central Government may, by notification in the Official Gazette specify		

Definition of VDA u/s. 2(47A) – Illustrative issues

- Whether covers credit card loyalty points, in-app points, airmiles, etc?
- Digital asset is not defined? Exclusion by notification only from second (NFT) and third (residual) categories?
- How RBI's digital currency will be excluded – whether as 'Indian currency' or by notification?
- No amendment to definition of 'capital asset' u/s. 2(14) – but 'property' is interpreted very widely
- Whether VDA is 'intangible asset' qualifying for depreciation if used for lending activity?

Special tax rate of 30% on transfer of VDA

- Total income includes any income from ‘transfer’ of VDA
  - ‘transfer’ u/s. 2(47) applies only to capital asset but s.115BBH applies to both capital asset and stock in trade
- Tax on transfer of VDA @ 30% (plus applicable surcharge and cess)
  - Effective tax rate can be as high as 42.74%
- Notwithstanding anything contained in any other provision of ITA
  - No deduction in respect of any expenditure (other than cost of acquisition) or allowance or set off of any loss under any provision in computing income from transfer of VDA
  - No set off of loss from transfer of VDA shall be allowed against income computed under any other provision and such loss shall not be allowed to be carried forward to succeeding AYs
- ‘Cost of acquisition’
  - Definition in s. 55(2) applies only to capital asset
  - Application of FIFO, LIFO or weighted average?
- Tax regime for VDA stiffer than lottery winnings or speculative loss

Special tax rate of 30% on transfer of VDA

- Applicable to both R and NRs
  - But complication for application to NRs in absence of situs rule
  - Treaty may also protect business income in absence of PE pending Pillar 1 implementation
  - ‘Representative assessee’ risk u/s. 163 for purchaser
- Applies to barter transactions also – complications for payments in VDA for services
- Exemption u/s. 54F and Chapter VIA deduction possible?
- Illustrative issues:
  - Whether set off of loss on VDA permitted against gain on VDA?
  - Treatment of losses carried forward from A.Y. 2022-23

Overview of TDS u/s. 194S

Features	Proposed provision
Effective date	1 July 2022
Transaction on which TDS applies	Payment on transfer of VDA
Payee	Resident
Payer	► Resident or NR ► If payer is NR, obligation to withhold taxes arguably arises only if NR has taxable presence in India
Rate of TDS	1% of consideration for transfer of VDA (no surcharge or cess)
Timing of TDS	► Payment or credit whichever is earlier ► Credit includes credit to suspense or any other account ► Payer obligated to ensure tax has been paid 'before' consideration is released to payee for in-kind payments (similar to lottery winnings u/s. 194B)

Overview of proposed S. 194S (contd…)

<table>
<tr><th>Particulars</th><th colspan="2">Proposed provision</th></tr>
<tr><td>Small taxpayer (“specified person”) [Explanation to S. 194S]</td><td colspan="2">Person being individual or HUF
• Sales / turnover/ gross receipts ≤ INR 1 crore (business) / INR 50 lakh (profession) during FY immediately preceding the FY in which VDA is transferred; (or)
• Who has no income under Business head</td></tr>
<tr><td rowspan="3">De-minimis limit [S. 194S(3)]</td><td>Type of payer</td><td>Threshold for TDS (Cumulative)</td></tr>
<tr><td>“Specified person”</td><td>INR 50,000</td></tr>
<tr><td>Any other person</td><td>INR 10,000</td></tr>
<tr><td>Additional relaxation for specified person [S. 194S(2)]</td><td colspan="2">► No requirement to obtain TAN under S. 203A
► No requirement to deduct TDS at higher rate under S. 206AB where payee has not filed income tax return</td></tr>
<tr><td>Issue of Guidelines [S.194S(6), S.194S(7)]</td><td colspan="2">► Powers granted to CBDT to issue guidelines with prior approval of CG to remove difficulty;
► Guidelines to be laid before both houses of Parliament and will be binding on tax authorities and payer/buyer of VDA</td></tr>
<tr><td>Interplay with other TDS provision [S.194S(4),(8)]</td><td colspan="2">► Tax ‘deducted’ u/s. 194S(1) overrides any other TDS or TCS for payer/buyer
► If both S.194-O and S.194S apply, S.194S shall prevail</td></tr>
</table>

Illustrative issues on TDS u/s. 194S @ 1%

- Difficulty in crypto-exchange based transactions – buyer and seller not identifiable- whether crypto-exchange liable to TDS? But s.194S overrides s.194-O
  - TDS/TCS exemption u/s. 194Q/206C(1H) provided to recognised stock exchanges vide Circular Nos. 13/2021 and 17/2020
- Difficulties in barter transactions
  - Valuation
  - How to ensure TDS payment 'before' release of consideration
  - No TDS exemption for transferor for payments for services in VDAs
- Default can trigger disallowance u/s. 40(a)(ia) for payer in computing business income (other than transfer of VDA)
- Gift by resident arguably not liable to TDS in absence of consideration
- S.194S arguably does not apply to activity of borrowing/lending of VDAs
  - But may apply to lender who receives compensation in VDAs for lending VDAs
  - Borrower faces dilemma – whether 'interest' u/s. 194A or 'royalty' u/s. 194J

Gift taxation of VDAs

- Definition of ‘property’ expanded to include VDA – whether as capital asset or stock in trade
- Rule 11UA may be amended in due course to prescribe valuation
- Consequently, receipt of VDA from any person without consideration or for inadequate consideration will be liable to tax as Income from other sources
  - Existing exclusions will continue to apply (eg. inheritance, marriage gifts, gifts from relatives, etc)
- Income not covered by s.115BBH – normal tax rates to apply
- Cost step up u/s. 49(4) but only for capital asset
- Applies to non-residents also but difficulty of application in absence of situs rules; some treaties may also provide relief
  - Corresponding TDS obligation u/s. 195 and Form 15CA/B reporting for payer
- Does not apply if receipt is in consideration of services rendered – but recipient required to do TDS u/s. 194S

S. 14A disallowance in the absence of exempt income (A.Y. 22-23)

- **Position before FB 2022:**
  - No deduction shall be allowed for expenditure incurred in relation to exempt income [S. 14A]
  - SB ruling in Cheminvest Ltd (2009) (121 ITD 318) and CBDT Circular No. 5/2014 – disallowance applies even in absence of exempt income
  - Series of HCs including Delhi HC in Cheminvest Ltd. [2015] 234 Taxman 761 – no disallowance in absence of exempt income
    - Rajendra Prasad Moody (115 ITR 519)(SC) distinguished
    - Tax Department's SLPs rejected
- **FB 2022 proposes to insert Explanation to s. 14A to provide that:**
  - Notwithstanding anything to the contrary contained in ITA
  - S. 14A shall apply and shall be deemed to have always applied
  - in a case where exempt income has not accrued/arisen/received during PY
  - and the expenditure has been incurred during the said PY in relation to such exempt income
- FB 2022 also proposes to amend s.14A(1) to provide that disallowance u/s. 14A(1) shall apply 'notwithstanding anything to the contrary contained in this Act'

S. 14A disallowance in the absence of exempt income (A.Y. 22-23)

- Effective from 1 April 2022 [i.e. from Assessment Year (AY) 2022-23 onwards]
  - While amendment is prospective, language is worded as if it is clarifying the law retrospectively
    - Similar to indirect transfer and royalty amendments in FA 2012
    - Courts will have to resolve whether newly inserted Explanation will apply only prospectively
- Amendment only suggests that absence of exempt income cannot prevent disallowance
  - No amendments to s.14A(2)/(3) and Rule 8D applicability
- Controversy for future periods limited due to reintroduction of classical system of dividend taxation
  - Exception - Dividend income from REITs where underlying SPV has not opted for s.115BAA lower rate

New Exp 3 to s.37(1) – Illegal payments (A.Y. 22-23)

- S. 37(1) allows any expenditure laid out or expended wholly and exclusively for the purposes of business
  - But expenditure incurred for any purpose which is an offence or which is prohibited by law is not allowed (Exp 1)
- Disputes on pharma/allied health sector providing various freebies to doctors - controversy explained in detail in EM
  - MCI guidelines prohibit doctors from accepting certain freebies
  - CBDT Circular No. 5/2012 – such freebies disallowable u/s. 37(1) - validity upheld by Himachal Pradesh HC
  - Courts granted deduction where taxpayer could demonstrate genuineness and bona fides of business need (e.g. low cost gifts/clinical stationery to doctors with company logo, free samples, etc.)
  - Tribunals also accepted taxpayer's defence that Regulations applied only to doctors and not to pharma companies
  - However, some courts denied deduction of unethical expenses such as referral fees, commission to prescribe medicines, commission by diagnostic centre to refer patients, sponsorship of personal vacations.
- Some courts also ruled 'law' does not include foreign laws (e.g. infringement of EU anti-competition law - Mylan Laboratories Ltd [2020] 113 taxmann.com 6 (Hyd)

New Exp 3 to s.37(1) – illegal payments (A.Y. 22-23)

- **Rationale provided in EM for proposed amendment**
  - Despite matter being sub-judice, legal position is clear that any expense incurred for providing benefits in violation of Regulations is inadmissible;
    - Favourable decisions are clearly not in line with legislative intent
  - Proposed amendment is to make legislative intent clear and free from any misinterpretation
- **New Explanation 3 w.e.f. AY 2022-23**
  - Clarifies Exp 1 ‘for removal of doubts’ to include and ‘deemed to have always included’
  - Expenditure incurred by taxpayer:
    - for any purpose which is an offence under, or which is prohibited by, any law for the time being in force, in India or **outside India**; or
    - to provide any benefit or perquisite, in whatever form, to a person, whether or not carrying on a business or exercising a profession,
      - and acceptance of such benefit or perquisite by such person is in violation of **any law or rule or regulation or guideline**, as the case may be, for the time being in force, governing the conduct of such person; or
    - to compound an **offence** under any law for the time being in force, in India or outside India

New Exp 3 to s.37(1) – illegal payments (A.Y. 22-23)

- Amendment is arguably prospective – but in ongoing litigation, courts may take notice of legislative amendment since the subject involves public policy
- Impacts following expenses:
  - Which are in violation of foreign law
  - Which are prohibited for recipients although not for payer
  - Compounding fees paid under Indian or foreign law
- Disallowance of benefit/perquisite **not** restricted to
  - Pharma sector
  - Payments to businessmen/professionals – applies also to employees
  - Violation of 'law' but also to 'rule or regulation or guideline' – ambiguity on private/internal rules/code of conduct
- Moot point – who decides whether infringement has happened
  - Cholamandalam MS General Insurance [TS-772-HC-2018(MAD)] – reinsurance premium
  - Anheuser Busch InBev India Limited (ITA No. 941 and 942/Mum/2021) – surrogate advertising in liquor industry
- Distinction between compensatory and penal nature still intact for first limb
- Ambiguity on out of court settlements without admitting guilt for third limb
- Initial onus on taxpayer to demonstrate Exp 3 not attracted (Form 3CD disclosure) – burden then shifts to AO
- Corporate governance issue for industry

S.194R- TDS on benefit or perquisite of a business or profession (1 July 2022)

- S. 28(iv) - value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession
- EM to FB 2022 - In many cases, recipients do not report the receipt of benefits in their return of income, leading to furnishing of incorrect particulars of income
- New TDS provision (i.e. S. 194R) proposed in FB 2022 to track such transaction and to widen and deepen the tax base – payments to residents

S.194R- TDS on benefit or perquisite of a business or profession (1 July 2022)

Particulars	Provisions of proposed s. 194R
Which payment covered	► Benefit or perquisite, whether convertible into money or not, arising from business or exercise of profession, payable to resident
Rate of TDS	► 10% (not required to be enhanced by surcharge & cess) ► Not possible to avail lower/NIL WHT certificate u/s. 197
Amount on which tax is to be deducted	► Value or aggregate of value of such benefit or perquisite provided to resident > Rs. 20,000 during the FY – but no valuation rules
Person obligated to withhold	► Person responsible for providing the benefit or perquisite to the resident (i.e. benefit provider) – defined in Exp to s.194R ► NR not having taxable presence in India arguably excluded ► No TDS obligation on individuals or HUF where sales/ gross receipts/ turnover $\leq$ INR 1 crore (business)/ INR 50 lakh (profession) during immediately preceding FY

S.194R- TDS on benefit or perquisite of a business or profession (1 July 2022)

Particulars	Provisions of proposed s. 194R
Identity of payee	► Where recipient is legal entity and benefit is actually availed by individuals, the payee in whose name tax is to be deducted can become tricky
Expenses Disallowance	► Default may trigger expense disallowance u/s. 40(a)(ia) in hands of benefit provider ► TDS u/s. 194R is in addition to regular TDS that may apply to underlying payments (e.g. 194C on catering or charter flight, 194J for professional artist, 194Q for goods, etc. ► Whether s.40(a)(ia) disallowance can apply for default in TDS u/s. 194R if proper TDS on underlying payments?
Date of applicability	► 1 July 2022 (Corrigendum to Finance Bill 2022)
Timing of TDS	► TDS to be deducted 'before' providing benefit or perquisite ► For in-kind benefits, benefit provider obligated to ensure TDS is paid before releasing the benefit/ perquisite ► Similar to TDS u/s. 194B on lottery or other winnings ► Collect TDS from payee or ask payee to directly deposit TDS – else appropriately gross up

S.194R- Illustrative issues

- Absence of valuation rules – S.295(2)(c) gives power to CBDT
  - Circular No. 20D provides example of rent-free residential accommodation provided to lawyer as an instance of perquisite taxable u/s. 28(iv)
- Distinction between bonafide business expense and personal benefit
  - Sales conference to discuss new business strategy, new products, etc – predominant business discussion with incidental leisure activity
  - Printer given free with object of earning from sale of cartridges
  - Free medical samples - Eskayef Ltd. etc. (245 ITR 116)(SC)
  - Discounts/rebates/cash incentives/credit card loyalty points (FBT Circular No. 8/2005 dated 29 Aug 2005)
  - Interest free loan - Salgaocar v CIT [243 ITR 383](SC) –not a perquisite unless specified
- TDS applies even if expense disallowable in hands of payer under new Exp 3 to s.37(1)
- Double taxation?
  - Freebies used in business; Interest free loan
  - If capital asset (eg. motor car) received, whether possible for payee to claim depreciation?
  - Perquisites to partners of firm/LLP which are disallowed in hands of firm/LLP
- Potential litigation where payer adopts conservative approach to deduct tax whereas payee puts up non-taxability claim in return – difficulty to claim TDS credit in absence of corresponding income?

Conversion of interest into debentures - S. 43B (A.Y. 23-24)

- **Existing provisions:**
  - S. 43B, inter alia, allows interest on loans or borrowings from banks and certain financial institutions only on actual payment
  - Explanations 3C, 3CA and 3D to s. 43B clarify no actual payment if any interest is converted into loan or advance
  - SC ruling in case of M.M. Aqua Technologies Ltd (2021)(129 taxmann.com 145)
    - Conversion of outstanding interest to debentures not hit by Explanations to s.43B
    - Liability to pay interest extinguished on issue of debentures – acknowledged by lenders
    - Lender offered interest income to tax – no abuse of s.43B
  - EM notes that some courts allowing deduction in these cases is not in line with legislative intent to curb the mischief of claiming deduction without paying interest to financial institutions
- **Proposed amendment:**
  - FB 2022 proposes to amend Explanations 3C, 3CA, 3D to s. 43B to provide that conversion of interest payable into ***"debenture or any other instrument by which liability to pay is deferred to a future date"*** shall not be deemed to have been actually paid

Conversion of interest into debentures - S. 43B (A.Y. 23-24)

- Prospective effect from A.Y. 2023-24
- Seeks to overrule M.M. Aqua Technologies Ltd but prospectively
- Whether recognition of interest income by lender becomes academic?
- Ambiguity on conversion into equity or preference shares – whether liability extinguished or deferred?
- Impact for debt restructuring or corporate insolvency resolution
  - Silver lining of deferral of carry forward of business loss and mitigation of s.79

Disallowance of education cess u/s 40(a)(ii) (A.Y. 2005-06)

- Deductibility of education cess as business expenditure has been a vexed issue
- EM provides detailed discussion
- Rajasthan and Mumbai HC * allowed cess as an expenditure while computing total income
- SC ruling K Srinivasan [(1972) 83 ITR 346] held that the additional surcharge named as “Cess” is nothing but a tax
- Placing reliance on the above SC Ruling, Kolkata ITAT Kanoria Chemicals & Industries Ltd [TS-1129-ITAT-2021(Kol)] held education cess not deductible as education cess is additional surcharge as per the Finance Act
  - Favourable HC rulings are per incuriam since SC ruling not considered
- FB 2022 proposes to insert Exp 3 to s.40(a)(ii) ‘for removal of doubts’ and to clarify that for s.40(a)(ii), the term “tax” shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax
- The amendment is applicable retrospectively from 1 April 2005 – contrast with other clarificatory amendments effective from A.Y. 22-23
- Surcharge or cess should be on tax covered by s.40(a)(ii) – no impact on cess levied on indirect taxes or standalone basis

** (Rajasthan HC in the case of Chambal Fertilizers TS-489-HC-2018(Raj), dated 31 July 2018, and Bombay HC in the case of Sesa Goa TS-163-HC-2020(Bom), dated 28 February 2020)*

Disallowance of education cess u/s 40(a)(ii) (A.Y. 2005-06) – Risk assessment for past litigation

Particulars	Impact analysis
Impact on principal tax liability	• In most cases, claim made by raising additional ground in assessment or appellate proceedings or post payment of taxes or putting up claim in ROI after paying advance tax • Demand will arise only if taxes paid are already refunded earlier to taxpayer .
Impact on interest liability	• No interest – if taxes are already deposited along with ROI • Interest under s. 234D if taxes paid are refunded under s. 143(1) earlier • Interest u/s 234B would trigger -Where there is default in payment of taxes • Application can be made to CBDT u/s 119 for waiver of interest* • If amendment is in true sense retrospective (and not clarificatory in nature), levy may also be challenged in appeal.
Impact on levy of penalty	Penalty defensible on following grounds: • No penalty on retrospective amendment • Claim is legal claim and is covered by favourable HC and ITAT rulings. • Duty of the taxpayer is to disclose the facts and not determine the correctness or evaluation of law in the realm of facts. • The HC rulings can be declared per incuriam, if at all, only by the SC or, larger bench of HC**
Risk of Prosecution	• Defensible
Way forward for past years	• Pay shortfall of tax, if not already paid or refund received (pay interest u/s. 234D) • For concluded cases, judgement call on timing of tax payment whether suo motu or on some action taken by Tax Department • Make application for waiver of interest

**[CBDT Order [F.No. 400/129/2002-IT(B)], dated 26 June 2006]*

***National Textile Corporation Ltd. V CIT [2008] 171 Taxman 339 (Madhya Pradesh HC)*

Explaining ‘source of source’ for loans/ borrowings u/s. 68 (A.Y. 2023-24)

- **Existing provisions:**
  - Taxpayer to explain ‘source’ of cash credit – Identity, creditworthiness and genuineness to the satisfaction of Tax Authority.
  - FA 2012 extended onus on Closely Held Companies (CHC[1]) also to substantiate ‘source of source’ in case of credit representing share application money, share capital, share premium or any such amount by whatever name called received from resident shareholders
    - Exception in respect of receipt from Category I/II AIF[2]
  - Taxation of income u/s. 68 has stringent consequences – (a) Taxation @78% (60% tax + 25% surcharge +4% cess); (b) Penalty @10% of tax – so total tax burden of 84%; (c) No set off of any loss, expenditure, allowance
- **Proposed provision:**
  - FB 2022 extends onus to prove ‘source of source’ in respect of ***‘loan or borrowing or any such amount’ w.e.f A.Y. 2023-24***
    - Existing exclusion for receipt from Category I/II AIF continues
  - Modified scope coverage can be summarised as under:

Proviso	Nature of credit in the books of accounts	Applicable to	Lender/Payer
1st	Loan or borrowing or any such amount	Every taxpayer (including NRs, all companies)	Any person whether resident or NR (excluding Cat I/II AIF)
2nd	Share application money, share capital, share premium or any such amount	Closely held company	Resident taxpayer (excluding Cat I/II AIF)

[1]Not being a company in which public is substantially interested

[2]As referred in s. 10(23FB) of ITA

Amendment in s. 68 of ITA (w.e.f. 1 April 2023 i.e. AY 2023-24 and onward):

- The additional burden is regardless of whether the parties are related or unrelated
  - Illustratively, even a bank would be asked to explain source of the deposits received from customers in savings, current, fixed, recurring deposit accounts in the course of its bonafide banking business
  - May extend to ECB loans, overseas borrowings by issue of forex or Rupee bonds
- Likely to result in double taxation. For instance, if A has lent monies to B and A is unable to explain the source in his hands, the amount can be added in the hands of both A and B
- Loan or borrowing or any such amount-
  - Whether would extend to deposits, advances from customers, EMD, Security Deposit ?.
- Practical challenges in borrower getting details from lender; issue of confidentiality of personal data

Voluntary filing of updated return [w.e.f. 1 April 2022]

As per Budget Speech:

- Some taxpayers may commit omissions/mistakes in correctly estimating their income
- Opportunity to file an updated return on payment of additional tax to correct such errors
- Reposes trust in taxpayers, an affirmative step in direction of voluntary tax compliance

As per EM:

- Existing timelines to file revised/belated ROI are inadequate
- Proposed amendment expected to result into: Utilization of huge data with tax department; Additional tax revenue; Ease of compliance by taxpayers in a litigation free environment

Proposed amendment by FB 2022 [Proposed s.139(8A)]

- Subject to exceptions, effective from 1 April 2022, any person can furnish updated return at any time within 24 months from end of relevant AY
- Triggers additional tax @ 25% - 50% of tax and interest due as per updated return
- Can be filed regardless of whether original/revised/belated return was filed earlier
- Unlike original/revised/belated return [where Explanation to s.139(9) provides that such return is valid despite non-payment of S.A. tax], updated return requires tax payment – else defective
- Power to remove difficulties given to CBDT
- Consequential amendments made in s.144, 153, 276CC

When updated return cannot be filed?

Qua status of taxpayer	Taxpayer belongs to a class of persons notified by CBDT
Qua nature of updated return	► Is a loss return ► Decreases tax liability as compared to original/revised/belated return ► Results in refund ► Increases refund due as compared to original/revised/belated return
Qua relevant AY	► If an updated return is already filed for such AY ► Any proceeding for assessment/ reassessment/ re-computation/ revision ► is pending or ► has been completed ► AO has information for such AY in his possession) and, that has been communicated to taxpayer prior to filing updated return ► Information under Specified Acts (such as Benami Property, Money Laundering, BMA) ► Information under s.90/90A ► Prosecution under Chapter XXII initiated for such AY in respect of taxpayer, prior to filing updated return
Qua block of AYs	► Relevant AY and preceding 2 AYs in cases of search/survey/requisition

Calculating tax, interest and additional tax payable on filing updated return

Particulars	Reference
Tax payable on filing updated return (after reducing prepaid taxes, FTC, MAT credit, etc)	a
+ Surcharge and cess payable on filing updated return	b
+ Interest u/s. 234A/B/C	c
+ Refund issued in respect of earlier return (where ROI filed earlier)	d
Total (d)	**e = a + b + c + d**
Additional tax payable on filing updated return:	
► Before 12 months from end of relevant AY	**25% of e**
► After 12 months but before 24 months from end of relevant AY	**50% of e**
[No interest u/s. 234A/B is leviable on such additional tax]	

Illustrating impact of interest, penalty, prosecution*

Particulars	Scenario 1 Original Return Filed	Scenario 2 Original Return Not Filed
Original Return for AY 2022-23:	**July 2022**	N/A
Income disclosed in Original Return	1,000	
Advance tax paid in Original Return (@ 30%)	300	
Omission discovered in original return after expiry of time for filing revised return	500	1,500
Updated Return for AY 2022-23:	**December 2023**	**December 2023**
Incremental Income disclosed in Updated Return	500	1,500
Incremental Tax payable in Updated Return	150	450
Interest u/s. 234A	No	On 450, from August 2022 to December 2023
Interest u/s. 234B	On 150 - from April 2022 to December 2023	On 450 - from April 2022 to December 2023
Interest u/s. 234C	On 150	On 450
Penalty u/s. 270A	Defensible#	Defensible#
Prosecution u/s. 276CC (for non-filing of return)	N/A	No
Prosecution u/s. 276C (for tax evasion)	?	Arguably, no

* Calculations are indicative and imprecise
# In public forum, CBDT official mentioned that penalty is not intended to be levied

Updated return or reassessment? Illustrative considerations

- Illustrative advantages of filing updated return
  - Avoids s.234B interest till completion of reassessment
  - Avoids exposure to penalty/prosecution
  - Can claim reliefs unrelated to escaped income, missed in original return
  - Avoids inquiry into issues unrelated to escaped income
  - Avoids time and cost of litigation
- Illustrative demerits of filing updated return
  - Higher s.234C interest as returned income includes escaped income
  - Additional tax levy of 25-50%

Illustrative issues

- Disclosure of foreign incomes/assets in updated return may not protect Black Money Act implications
  - S.4 of Black Money Act defines scope of undisclosed foreign income as that not disclosed in ROI specified in s.139(1)/(4)/(5)
- Ineligibility applies if prosecution is “initiated” for relevant AY under any provision of Chapter XXII
  - Whether mere issuance of SCN itself results into initiation of prosecution? Refer, FAQ 22 of CBDT’s Circular No. 9 of 2020 on VSV
  - Bar gets triggered for relevant AY even if prosecution is initiated for TDS default unrelated to income offered in updated return?
  - If offence is compounded, is taxpayer eligible? – arguably, yes [above FAQ 22 supports]
- Whether updated return possible?
  - Return filed – No intimation u/s. 143(1)- Time limit for issuing notice u/s. 143(2) not expired (Filing of ROI results in commencement of proceedings - Auto and Metal Engineers (229 ITR 399) (SC))
  - Intimation u/s. 143(1) issued without variation – whether ‘recomputation’ completed?
  - Intimation u/s. 143(1) issued with variations – whether ‘recomputation’ completed?

Streamlining faceless assessment (w.e.f. 1 April 2022)

- Key changes to streamline the process of faceless assessment and to address various legal and procedural issues in implementation of the said scheme :
  - Specific provision to grant an opportunity of personal hearing to all taxpayers upon request. However, such hearing should be mandatorily be conducted through video conferencing;
  - Reassessment proceeding specifically covered (Overlap with s.151A)
  - National Faceless Assessment Centre (NFAC) is only to act as single point of contact amongst various units under the scheme and/or with taxpayer to conduct proceedings in faceless manner. No other functions (such as processing of draft assessment order, etc.) will be undertaken by NFAC;
  - Various units (such as Assessment Unit, Verification Unit, etc. which comprises of one or more tax authority) represent 'Assessing Officers' having powers so assigned by CBDT';
  - Regional Faceless Assessment Centres are abolished
  - 'Income or loss determination proposal' prior to draft assessment order – to be reviewed only once by Review Unit
  - CBDT Guidelines to replace RMS & Automated Examination Tool for processing income or loss determination proposal by NFAC
  - A specific provision declaring the assessment as void if the faceless assessment procedure prescribed in the provision is not followed is omitted with retrospective effect from earlier date
    - This amendment will be effective retrospectively from 1 April 2021
    - But requirement to adherence to principles of natural justice is always implicit

Key changes in new reassessment regime (1 April 2022)

- Reassessment regime completely revamped vide FA 2021
- Criteria of 'reason to believe' under old law substituted by information with AO which 'suggests' that income chargeable to tax has escaped assessment for the relevant year
- Sources of said information are expanded as under:

FA 2021 as amended by FB 2022	Remarks
Any information ~~***flagged***~~ in the case of taxpayer in accordance with the risk management strategy formulated from time to time by CBDT	• EM says correction of inadvertent drafting error • But 'blind spot' for taxpayer
Any **audit objection** ~~**final objection raised by C&AG**~~ that assessment in the case of the taxpayer was not in accordance with the provisions of ITA	• Even internal revenue audit or preliminary CAG objection will trigger reassessment
Any information received from a foreign jurisdiction under an agreement entered into u/s. 90 or section 90A;	• Even if it matches with taxpayer's return?
Any information requiring action in consequence of a tribunal/court order;	• Overlap with s.150 r.w. Exp 2 to s.153(6)? • Non-tax or foreign courts covered?
Information received under a scheme notified under section 135A (Dealing with information collected by tax authorities electronically under different provisions of ITA)	• Scheme yet to be notified – no visibility • Pre-notice procedure u/s. 148A will not apply – Will it be incorporated in scheme itself?

Expansion of cases where extended time limit can apply [S. 149(1)(b)] [1 April 2022]

Scenario	FA 2021	FB 2022	Remarks
General Time Limit	3 Years from end of AY	3 Years from End of AY	No Change
Extended Time Limit	10 Years from end of AY	10 Years from End of AY	• No change in time limit. But threshold is now aggregate or is it unintended omission?
	AO has in his possession books of accounts or other documents or evidence which reveals that income chargeable to tax which has escaped assessment amounts to or is likely to amount to INR50L or more **for the year**	Reference to **"for the year"** is deleted	
	Such escaped income is **represented in the form of an asset**	Such escaped income is **represented in the form of**: • **Asset** • **Expenditure** in respect of a transaction; • Expenditure in relation to an event or occasion; or • An **entry** or entries in the books of account.	• Associated conditions for trigger of extended time limit expanded. • Whether presence of undisclosed income is a must to trigger extended limitation period? • Whether possession of books of accounts with AO is pre-requisite for commencement of pre-notice procedure?

Determination of Rs. 50 lakhs threshold for extended limitation period (1 April 2022)

- Erstwhile requirement of Rs. 50L threshold to be seen “for that year” in S. 149(1)(b) is removed and cumulative factors of asset, expenditure and book entries is inserted
- New S. 149(1A) introduced whereby:
  - Notwithstanding anything contained in s.149(1)
  - If income represented in the form of **(i) an asset or (ii) expenditure in relation to an event or occasion**, amounting to Rs.50 lacs or more, has escaped assessment and
  - the investment in such asset is made or the said expenditure is incurred in more than one previous years falling within the time limit of 149(1)(b), then
  - AO is empowered to issue reassessment notices for every such assessment year
- Ambiguity on application of Rs. 50 lakhs threshold qua each year or multiple years for
  - Cumulative factors of asset, expenditure and book entries
  - Escaped income represented by book entries

TDS on immovable property u/s. 194IA [1 April 2022]

- Existing provision – 1% on sum paid/payable to transferor where consideration ≥ Rs. 50 lakhs
- Stamp duty value (SDV) not reckoned
- **New provision – TDS on higher of sum paid/payable or SDV**
  - No change in threshold of Rs. 50 lakhs
  - No tolerance limit of 10% unlike s.50C or 56(2)(x) – unintended lacuna?
- Illustrative issues
  - Instalment payments – Deduct on last instalment?
  - Applicability to instalments falling due on or after 1 April 2022?
  - TDS credit arguably available even if income assessed on actual consideration being within 10% tolerance limit
  - Arguably not applicable to gifts – TDS triggers only if sum payable as consideration

Computation of interest in case of continuing TDS/TCS default (1 April 2022)

- S. 201(1A)/206C(7) provides for simple interest on TDS/TCS default up to the date of payment of taxes at the rates specified therein (1% / 1.5% pm)
- FB 2022 provides where order is made by AO for default u/s. 201(1)/206C(6A), interest shall be paid by the person ***in accordance with such order***
- EM to FB 2022 suggests that computation of interest where the TDS/TCS default 'continues' has been a matter of frequent litigation
  - CBDT official's clarification in public meeting - Amendment intended to address an argument that no interest can be levied till TDS/TCS is paid in absence of terminal date for levy of interest
  - AO's order continues to be appealable

Thank You